NO. 15156

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

R. H. PHILLIPS and JESSIE E. PHILLIPS, his wife, R. R. HAGGERTY and WINNIE HAGGERTY, his wife, and D. EVERETT PHILLIPS and EVELYN PHILLIPS, his wife, individually and in behalf of the Cold Creek Company, a partnership.
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 15156

BRIEF FOR APPELLANTS

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BRIEF FOR APPELLANTS

The appeal is by the defendants from judgments on the verdict in the Consolidated Cases, Civil No. 892, 488, 452, and 762, awarding the defendants compensation in an action for condemnation. The defendants have appealed because the Court rejected introduction of evidence as to the value of minerals, mineral rights, and mineral leaseholds after proffers were made, and as a result thereby the compensation awarded was inadequate and unjust.

STATEMENT OF JURISDICTION

The action was by the United States to condemn lands in Yakima County, Washington, pursuant to and under the provisions and authority of and for the purposes and uses authorized by the Acts of Congress approved February 26, 1931 (46 Stat. 1421, 40 U. S. C. Sec. 258a), and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress

approved August 1, 1888 (26 Stat. 357; 40 U. S. C. Sec. 257) and the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241) and April 11, 1918 (40 Stat. 518; 50 U. S. C. Sec. 171) which Acts authorize the acquisition of land for military or other war purposes and the Act of Congress approved October 29, 1949 (Public Law 434—81st Congress), which Act appropriated funds for such purposes.

The judgments appealed from were entered November 30, 1955. R. 50-74. Defendants' motion for a new trial was denied January 6, 1956. R. 78-79. Notices of appeal were filed March 2, 1956. R. 79-82. This Court has jurisdiction upon appeal to review the judgment under Section 128 of the Judicial Code, as amended, 28 U.S.C.A., Sec. 255 (a).

STATEMENT OF THE CASE

The complaints in condemnation were filed December 17, 1952, to condemn certain leasehold interests (Civil Action Nos. 762, 452, and 488) and on February 15, 1954, as to certain fee simple title (Civil Action No. 892) to lands in Yakima County, Washington, for the purpose of adequately providing for an artillery range and for a training and maneuver area for troops in connection with the Yakima Artillery and Anti-Aircraft Firing Range. Civil Action No. 892, in which fee simple title was held by the appellants, involved a taking of approximately 33,213.13

acres. The mineral rights on 26,000 acres of said lands had been severed and dealt with by the appellants prior to the time of taking, and were owned by the Cold Creek Company, a partnership, comprising the appellants and Walter V. Swanson and Marjorie T. Swanson, defendants. Ex. 120, R. 233-234.

The sole question involved is the Trial Court's refusal to permit testimony and evidence to be submitted for the purpose of establishing a value to minerals, mineral rights, and mineral leaseholds in connection with said 26,000 acres.

The area involved in the taking had a record of being gas bearing, gas having been produced commercially for a period of approximately eleven years. R. 135. There is no record of commercial production of oil. In the years prior to the taking, and subsequent thereto, there was considerable activity in the leasing of land for mineral purposes by major oil companies. At the time of taking, the appellants had leased a substantial block of land to Shell Oil Company (rejected Ex. 97) for mineral exploration and development, and also had an option for mineral leases on the remainder of said lands to Laurent Regimbal, as agent for oil and gas concerns. (Rejected Ex. 96). All of the major oil companies were actively leasing in the area. R. 40-41, 236-242.

During the pendency of the action, on May 6, 1955, the appellants filed a petition for dismissal of mineral

rights from condemnation proceedings, R. 40-42, and on the 24th day of June, 1955, an order denying petition for dismissal of mineral rights from condemnation proceeding was entered. R. 42-43.

The Northern Pacific Railway Company, a defendant in Civil Case No. 892, having reserved mineral rights to the balance of the lands held by appellants Phillips and Haggerty, was dismissed from the trial, and the determination as to approximately 5620 acres of mineral rights was postponed until some future time by order of the Court dated October 24, 1955. R. 69-70, (Judgment on Verdict), R. 129, 130.

In the trial of the consolidated cases, the Trial Court indicated immediately that he was "quite disturbed . . . about this mineral rights situation." R. 88. He endorsed the position of government counsel that "unless the land is a proved field or reasonably adjacent to a proved field, which isn't the situation here, that mineral values, as such, cannot be made the basis of compensation, unless there can be shown *reasonable probability* that they exist there. And, having been through these cases before, *I don't think it is possible to show reasonable probability* of gas and oil values under these lands." R. 89. (Italics mine).

The Trial Court further stated, "I can't see how as a practical matter you could prove how much the possibility of leasing for exploration would enhance the

market value of this land unless you could show how much is paid by oil companies for leases, and then you get back to the proposition of putting in these leases and the amount that the owner would get for exploration leases, which I think is clearly improper because it is too speculative." R. 89.

The record shows that counsel for appellants sought by stipulation with the government to separate mineral values from the remaining value, the Court having conceded that "the exploitation of mineral value would not be inconsistent with agricultural value," R. 92, but no stipulation was entered into between the parties.

Thereafter, counsel for appellants made repeated proffers of exhibits and testimony in connection with establishing a value incident to mineral rights as a result of the lands being a part of an active leasing area. R. 134, 135. Appellants sought to introduce the testimony of a geologist from Shell Oil Company to testify as to the presence of factors in the area necessary for exploration of gas and data as to existing leases in the field, R. 170, and the testimony of a lease agent from Carter Oil Company, a subsidiary of Standard Oil Company, to testify as to dealings in mineral leases and rights in the area, including his own activities. R. 170.

A proffer was made as to the existence of and development of gas in the area. R. 173, 174.

Exhibit No. 97, a lease on mineral rights from the

appellants to the Shell Oil Company, prior to taking, and Exhibit 96, an option to lease from appellants to Laurent Regimbal, were proffered, R. 207-210, and the Court at that time reserved ruling, R. 210-212, stating, however, that "I take the position that the existence of these prospecting leases becomes material only in the event it is shown that there are mineral right values or minerals of substantial value in the property, and that if there isn't anything shown on which there could be compensation for minerals, the fact that there are mineral leases is immaterial."

Exhibit 120, the deed of mineral rights from the defendants individually to the Cold Creek Company, comprising the appellants and the Swansons, defendants, Exhibit 96 and Exhibit 97, were later in the course of the trial admitted by the Trial Court for the sole purpose of consideration by the Court as to the state of the title, the Court again reserving ruling as to whether said exhibits should be submitted to the jury. R. 233-235.

Counsel for the appellants prior to closing appellants' case then made a formal offer of proof encompassing all that had gone before and developing further the evidence, both as to oral testimony and written exhibits, sought to be introduced. R. 236-242. Said offer of proof outlined the evidence appellants believed would establish a definite basis for ascertainment of mineral values by the Court and jury, and included the following facts:

1. The basic factors which govern the decision by major oil companies of whether to invest in leaseholds and to explore for oil.

2. The presence and existence of a sufficient number of said factors in the subject land.

3. The probability of oil or gas in the area, based on geological surveys.

4. That the area in question constituted an active leasing area of common knowledge among oil people and owners of real estate.

5. That Shell Oil Company, Ohio Oil Company, Texas Oil Company, Richfield Oil Company, and Standard Oil Company are and have been leasing mineral rights in said area.

6. That recent sales of lands in the area have all involved a reservation of mineral rights.

7. That the leasehold interest in mineral leases, the landowners' mineral estate, and the option to lease for mineral rights all have a definite ascertainable value.

8. That companies make a business of investing in a percentage of the mineral estate remaining in the landowner after a lease of the mineral rights to a major oil company.

The Court then rejected Exhibit 96, the option to lease from appellants to Regimbal, and Exhibit 97, the

mineral lease from appellants to Shell Oil Company, and Exhibit 120, the Cold Creek Company lease, indicating that said exhibits were not proper evidence to determine value at time of taking. R. 252, 253. Testimony by the Shell geologist, Mr. Valentine, and the Carter Oil land man, Mr. Beam, together with all the other elements of proof set forth above, were rejected, the Court holding that such evidence proffered "would be entirely speculative in nature as to the possibilities of there being oil or gas here in *a completely undeveloped and undiscovered area.*" (Italics mine). R. 250. The Court emphasized that there must be "discovery or development of commercial proportions . . . in the vicinity." R. 250. The Court's ruling in part is as follows:

> "I think that the rule that should be applied here is the one that, since I think the Court can almost take judicial notice of the fact that this land is not in or anywhere near a commercially producing mineral area, gas and oil area, that allowing a jury to place a valuation on mineral rights or on the right to lease it for prospecting for gas and oil would be too speculative and remote to form the basis for compensation.
>
> "And I think that will be my ruling here, that I will not submit this for the jury and will not submit to them the leases which have been received in evidence. They will be here for the purpose of showing the state of the title." R. 252-253.

The Court further stated in conclusion:

> "There is this matter that occurs to me: I think it would be extremely dangerous in a case of this kind to submit to the jury the question of whether or not

there is substantial mineral value here and allow them to place an unknown value, a value which we wouldn't know they had placed, when their verdict came in. If they returned a verdict, as the owners hope they will, of upward of a million dollars, no one could ever tell whether $10 or $500,000 of that was based upon their idea of what these minerals might be worth, and if I should happen to be wrong, which it is my best judgment I would be, if I submitted it, the case would be upset in the Court of Appeals and it would come right back here a couple of years from now and we would start all over again to try this case again at that time. Of course, that is only a sideline observation because the basic responsibility of making these rulings rests on the trial court and that is where I recognize it is and that is where I accept it, and so the ruling is mine, I simply make this other observation as a sort of a sideline comment." R. 253-254.

The Trial Court, having rejected all proffered testimony and evidence concerning a determination of value as to mineral rights, instructed the jury as follows:

"Now, there has been some mention made of mineral rights here. I think I should tell you that that question has been carefully considered by the Court and the Court has come to the conclusion as a matter of law, and you are instructed, that there has been shown no substantial value here for mineral rights and you are not to award any value for mineral rights. You are to utterly disregard any evidence that may have come in or any mention of that matter." R. 259, 260.

The basic question on the appeal is whether all the proffered evidence as to mineral values, existing mineral leases, and the buying and selling of mineral estates was properly excluded by the Court. In making its ruling concerning the inadmissibility and rejection of said evidence,

the Trial Court admitted that, "There seems to be an increasing activity here in this area in the way of leases for prospecting of gas and oil." R. 252.

By reason of the exclusion of evidence as to said values, and the fact that the jury had no opportunity to translate the loss of these valuable rights and property interests into the equivalent in money, the appellants therefore were deprived of "just compensation," the verdict as to Civil Case No. 892 being inadequate as a matter of law.

Although the diminution of the verdict was directly related only to Civil Case No. 892, the refusal of the Trial Court to admit the evidence as to mineral values, the partisan attitude of the Trial Judge in dealing with this problem and in excluding the evidence, inured in the verdict as to all four consolidated cases. The inevitable result was that appellants were denied a fair and impartial trial and the right safeguarded by the Fifth Amendment that private property shall not be taken for public use without just compensation.

SPECIFICATION OF ERRORS

1. Rejection of Defendants' Exhibit 96—an option to lease mineral rights from appellants and defendants Swanson to Laurent Regimbal, and Exhibit 97—a mineral lease from appellants and defendants Swanson to Shell Oil Company, at 25c per acre, both of said exhibits being

executed prior to the taking for valuable consideration, and both dealing with subject lands. R. 234-241.

Evidence offered to show proof of the following facts:

a. Value of appellants' mineral estate, through rental payments and possibiltiy of oil or gas production.

b. Highest and best uses of land not inconsistent with agricultural use.

Evidence rejected by the Court for the reason that "allowing a jury to place a valuation on mineral rights or on the right to lease it for prospecting for gas and oil would be too speculative and remote to form the basis for compensation." R. 252-253.

2. Rejection of proffers of testimony of Mr. Valentine of the Shell Oil Company, and Mr. Beam of Carter Oil Company, a subsidiary of Standard Oil Company, said testimony to establish sub-surface geology of area, and to establish a contractual interest in the geology of the subject property by major oil companies, to prove probability or possibility of oil or gas development and production, to establish that condemned lands were within an active leasing area, to set forth all transactions in the area as to purchase and sale of leasehold interests and mineral estates. R. 170, 236-242.

Evidence offered as proof of:

a. Real and ascertainable value of mineral leaseholds, and mineral estates.

b. Active barter in mineral leaseholds and mineral estates.

c. Possibility of oil or gas production.

Evidence rejected by the Court for the reason that "allowing a jury to place a valuation on mineral rights or on the right to lease it for prospecting for gas and oil would be too speculative and remote to form the basis for compensation." R. 252-253.

3. Requirement by the Trial Court that the appellants conduct their case in accordance with the desires of the Court as to order and manner of proof, thereby denying appellants a fair trial and due process of law.

ARGUMENT

1. Appellants Denied Just Compensation by Erroneous Exclusion of Evidence.

The discussion on the first two errors relied upon, concerning exclusion of evidence, can be considered together. The basic error relating to said exclusion of evidence is that as a result the appellants were deprived of "just compensation" as a matter of law.

The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been

taken. *U. S. v. Miller*, 317 U. S .369, 373; 63 S. Ct. 276, 279; 87 L. Ed. 336.

In *Olson v. U. S.*, 292 U. S. 246, 255, 54 S. Ct. 704, 708, the Supreme Court stated as follows:

> "In respect to each item of property that value may be deemed to be the sum which, considering all the circumstances, could have been obtained for it, that is, the amount that in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy. In making that estimate there should be taken into account all considerations that fairly might be brought forward and reasonably be given substantial weight in such bargaining. *Brooks-Scanlon Corp. v. U. S.*, 265 U. S. 106, 124; 44 S. Ct. 471; 68 L. Ed. 934, 941."

The Supreme Court has further held that the ascertainment of value is not controlled by rigid rules or artificial formula. What is required is "a reasonable judgment having its basis in a proper consideration of all relevant facts." *Minnesota Rate Cases*, 230, U. S. 352, 434, 33 S. Ct. 729, 57 L. Ed. 1511. *Standard Oil Company of New Jersey v. Southern Pacific Company*, 268 U. S. 146, 156, 45 S. Ct. 465, 69 L. Ed. 890.

In *U. S. v. General Motors Corp.*, 323 U. S. 373, 378, 65 S. Ct. 357, 359, 89 L. Ed. 311, the Supreme Court declared:

> "Property . . . denotes the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it . . . The constitutional provision is addressed to every sort of interest the citizen may possess."

The evidence which counsel for appellants attempted to introduce, including the Shell Oil Company mineral lease, Exhibit 97, and the Regimbal mineral option, Exhibit 96, would have established that the appellants at the time of taking had received and would in all probability receive in the future 25c an acre for leasing all or a substantial part of the 26,000 acres. Further evidence sought to be introduced, including the testimony of Mr. Beam and of Mr. Valentine, would have established that there was considerable activity by the major oil companies and independents in the purchase and sale of mineral leases and mineral royalties and that the major oil companies in the area had paid from 25c to $2.00 per acre for mineral leases. Said proffered testimony would have further established that in the opinion of the geologists and experts of the major oil companies, including Mr. Valentine of Shell Oil Company, the entire 26,000 acres which the appellants owned constituted an active leasing area of common knowledge among oil people and owners of real estate, R. 239, and that the factors present indicated the probability of the existence of gas or oil in the area. The offer of proof further stated that the testimony of Mr. Beam would establish that persons of ordinary busniess judgment were investing in mineral estates in the area, that is to say, buying a portion of the landowner's remaining interest after a lease to a major oil company. R. 240. Mr. Beam would also have testified that there is a very real value in a mineral lease and in

an option for a lease in a so-called wildcat area even though there has not been a strike of oil. R. 241. The offer of proof would further have established that the area was in the past for a minimum of eleven years a producing area for gas. R. 135.

Can it arbitrarily be said, without having heard the testimony of any one of the proffered witnesses, that the mineral interests in connection with the 26,000 acres of condemned land are valueless? Such a finding goes against common sense and logic. As a matter of fact, with the proffered evidence that major oil companies were then spending and have since spent money for oil leases and oil development, any reasonable person would admit that in the event of the sale of land, these factors would be considered by both the seller and the purchaser. As a result a higher price would be paid than if there were no activity whatsoever in connection with mineral leasing and exploration.

The property rights taken away from appellants by the sovereign without even nominal compensation are as follows:

1. Right to receive 25c per acre from Shell Oil Company under existing lease.

2. Right to receive 25c per acre from Regimbal or his assignee upon exercise of the option to lease.

3. Right to bargain for and sell leasehold interest to

major oil companies in any lands not covered by Shell lease or taken up by Regimbal, at 25c per acre or more.

4. The right to bargain for and sell a percentage or all of the interest of appellants in the mineral estate, whether they have previously leased to a major oil company or not.

5. The right to benefit as dominant owner of the mineral estate from possible oil or gas production.

The value of each of the above property rights would of course vary, from tremendous values if oil or gas were commercially produced in the area, to a lesser value based only on the income from leaseholds and mineral estates. R. 241.

However, if the evidence sought to be introduced was received, and properly presented in accordance with the offers of proof, the jury could find a minimum value to the dominant owners of the mineral rights, as lessors, of 25c per acre for the 26,000 acres. Ex. 96, 97. If the witnesses further established a market value in the dominant mineral estate, R. 240, which value was fixed at $1.00 per acre for a half interest in a transaction relating to land in the immediate area, R. 76, then the jury could further find that said dominant mineral estate had a real and tangible value.

It appears in the record that a proffer was made that gas in commercial quantities was produced in the area

for a period of eleven to fourteen years, serving a substantial part of the Yakima Valley. R. 135, R. 173. Although this commercial production ceased some twenty-five years ago, this time span is insignificant in a determination of whether or not there is a reasonable possibility of oil or gas production in the area in question. In the past ten years, the major oil companies of the United States, faced with dwindling oil reserves, and greatly increased demand, have engaged in extensive oil and gas exploration, always necessarily preceded by intense activity in leasing of mineral rights and purchasing of mineral rights.

The instant case is the only one that has come to the attention of counsel for appellants where the Trial Judge, dealing with condemnation of lands in an active leasing area, and with severed mineral estates and leaseholds, rejected the admission of evidence and testimony at the time the proffers were made. There are cases where the Trial Court instructed the jury that the evidence was insufficient to warrant their considering mineral value; of instructions limiting the jury in the determination of mineral values; and of instructions setting forth the degree of proof necessary to establish mineral values. But in no other case did the Trial Court deny entirely to the landowners the opportunity to prove their case as to possible mineral values.

Consideration of cases involving leasehold interests

and mineral rights in the federal courts shows an increasing recognition by the courts that mineral rights, other than actual production of gas and oil, have a real and ascertainable value in our world of today.

In *Montana Railway Company v. Warren,* 137 U. S. 348, 11 S. Ct. 96, 97, 34 L. Ed. 681, the Supreme Court, with reference to an undeveloped mining claim, said as follows:

> "It may be conceded that there is some element of uncertainty in this testimony, but it is the best of which, in the nature of things, the case was susceptible. That this mining claim which may be called 'only a prospect,' had a value fairly denominated a 'market value,' may be, as the Supreme Court of Montana well says, be affirmed from the fact that such prospects were the constant subject of barter and sale. Until there has been full exploiting of the vein, its value is not certain. and there is an element of speculation, it must be conceded, in any estimate thereof. And yet uncertain and speculative as it is, such prospect has a market value."

It is stated further:

> "In respect to such value, the opinions of witnesses familiar with the territory and its surroundings are competent. At best, evidence of value is largely a matter of opinion, especially as to real estate."

And in the *Eagle Lake Improvement Co. v. United States,* (5th C.C.A.), 141 F. (2d) 562, at 564, the Appellate Court stated:

> " . . . The instructions to which objection was made in substance charged that the jury should find the mineral interests valueless unless from the evidence

> it was believed that a reasonable probability existed that oil or gas in paying quantities might be produced. As held in *Olson v. United States*, 292 U. S. 246, 257, 54 S. Ct. 704, 78 L. Ed. 1236, elements affecting value that depend upon occurrences which, though possible, are not reasonably probable, should be excluded from consideration as too speculative and conjectural to afford a basis for the judicial ascertainment of value. In Texas, however, a mineral lease is recognized by law as being property having a market value even if it covers undeveloped territory. Where oil interests are involved, a reasonable probability of successful development is sufficient to make leasehold estates of great value; indeed, where there is a reasonable possibility of production in paying quantities, mineral rights are a common subject of barter and sale, and therefore have a definite, ascertainable market value, even where the prospects of successful development are too speculative and remote to be 'reasonably probable.' In any event, such leases have a nominal value."

In *Southern Pacific Railway Co. v. San Francisco Savings Union*, 79 Pac. 961, 964, the Supreme Court of California, referring to reservation of mineral rights by landowner in a deed to the railroad, said:

> "It no doubt will always be more difficult to prove whether a reserved right in oil is valuable or not, much more so than such a right in fixed minerals; but it cannot be said impossible to do it."

In the instant case appellants were never even given the opportunity to try, and it thereby became impossible to do it.

The most recent case in point is that of *Cal-Bay Corporation et al v. United States*, 9th Cir., 169 F. (2d) 15; cert. den., 69 S. Ct. 134; 335 U. S. 859; 93 L. Ed. 406,

The Trial Court in the Cal-Bay Corporation case gave an instruction in part to the effect that "Future income or speculative productive value contemplated is not a measure of condemnation value." The Court had refused to give the following instruction proposed by defendants:

> "This action concerns the value of the gas and oil rights and the leases given for such development on the lands taken by the Government. Gas and oil leases are recognized by law as being property having a market value even if such leases are in undeveloped territory. Where gas and oil rights are concerned a reasonable probability of successful development is sufficient to make such leaseholds of great value. Where there is reasonable possibility of production in paying quantities gas and oil leases are common subject of barter and sale and, therefore, have definite ascertainable market value.
>
> "There is a definite market value even where the prospects of successful development are too speculative to be reasonably probable. If the uncertainties are such that the mineral interests in the condemned lands are bought and sold at arms-length transactions for valuable considerations, they have a market price translated into a fair market value for condemnation purposes."

The Appellate Court held that the Trial Court erred in refusing such an instruction, stating in part as follows:

> "We think the district court erred in refusing such an instruction. We take notice that, in California, discovery in land of a reasonable probability of successful development of gas or oil gives great value to such land and that it has a market value even where the prospects of possible successful development are too speculative to be reasonably probable. The evidence, later quoted, shows there are hundreds of sales of

lessor and lessee rights in lands with such speculative value."

In the instant case, also, had the appellants been afforded the opportunity, they could have shown many sales of lessor and lessee rights in lands with speculative value, through the testimony of the proffered witnesses.

The Appellate Court in the Cal-Bay case stated further:

> "That such speculative value is provable in such condemnation proceedings has been recognized by the Fifth Circuit in a case concerning such interests in lands in the southern distrist of the oil producing State of Texas. *Eagle Lake Improvement Co. v. United States,* 5 Cir., 141 F. 2d 562, 564."

An application of the foregoing rules to the proffers made and evidence sought to be admitted justifies the assumption that if the appellants had been permitted to introduce said proof there would have been established additional values to be considered by the jury, within the limits of an appropriate instruction by the Court.

In the case of *Cal-Bay Corporation et al v. United States,* supra, and of *Eagle Lake Improvement Co. v. United States,* supra, it was held that erroneous instructions constituted prejudicial error. The instructions might well have led the jury to bring in a lesser amount and therefore the landowners would not have received "just compensation."

In the instant case, however, the effect of the erron-

eous exclusion of evidence is even more apparent. The jury was not permitted to even consider mineral values. The verdicts, therefore, could not, and did not, reflect any valuation whatsoever as to mineral rights, and could not represent "fair compensation."

It is conceded that if the rejected evidence had been admitted, and a proper instruction given, the jury might well have returned a considerably greater verdict, or perhaps only a nominal increase. But a determination of values is rightfully, and should have been, a matter for the jury to decide. These proffers related to material and relevant evidence. It was error to exclude them. See *Knollman v. United States*, 214 F. 106, 108.

The Trial Judge must necessarily have relied upon personal knowledge or belief or experience concerning oil and gas matters in order to arbitrarily reject the proffers of evidence. R. 89.

The Court acknowledged the increased activity here in this area. R. 252. Yet the Court substituted its judgment for that of the jury, and arbitrarily excluded the evidence and testimony which could well have established that said increased activity had brought with it a real and ascertainable value as to mineral leaseholds and mineral estates. The Court referred to the Martinez case, R. 89, stating that:

> "Now I think in a prior case I did submit the rather tenuous proposition that the jury could find how much

the market value of the land had been enhanced by the possibility of leasing it for exploration purposes, but, frankly, I am getting a little concerned about that and doubtful about it."

Counsel for appellants pointed out that he could present a stronger case as to proof of mineral values than the Martinez case, because the area was an active leasing area at the time of taking in the instant case, and was not in the Martinez case. R. 134. The Court observed:

"Well, as far as my following this instruction is concerned it is helpful to have at hand what you have said in some prior case, but, of course, a judge should be like a wild goose, every day is a new day, and I am not bound to anything that I did even yesterday even as far as today is concerned." R. 135-136.

No fault can be found with this expression of judicial procedure, but it is most respectfully contended that the change of policy in this instance, which was reflected in the exclusion of material and relevant evidence, seriously prejudiced the entire case for the appellants.

The Trial Court emphasized its own error in excluding evidence of mineral values when it instructed the jury as follows:

"The Court has come to the conclusion as a matter of law, and you are instructed, that *there has been shown no substantial value* here for mineral rights and you are not to award any value for mineral rights." R. 260. (Italics mine).

It is difficult to conceive how the appellants could have "shown" value for mineral rights when they were

precluded from presenting the evidence they had assembled.

The Trial Court, in excluding the proffered evidence, attempted to justify its action as follows:

> "Unless the land is a proved field or reasonably adjacent to a proved field . . . mineral values, as such, cannot be made the basis of compensation, unless there can be shown *reasonable probability* that they exist here. And *having been through these cases before,* I don't think it is possible to show reasonable probability of gas and oil value under these lands." (Italics mine). R. 89.

The testimony of the expert witnesses which the appellants sought to introduce, would have established the fact that proximity of land to a commercially producing mineral area does not of itself determnie whether that land has sub-surface oil or gas. Land could lie one mile off an anticline or structure and be therefore devoid of even the possibility of having oil or gas. It is the sub-surface structure of the land, not the proximity to producing wells, that governs whether or not there is a reasonable possibility of valuable deposits being found. Yet the testimony which would have proven "reasonable possibility" was excluded.

The Court then stated, with reference to the Eagle Lake Improvement Co. case, supra:

> "In Texas and under Texas law a mineral lease is recognized by law as being property having a market value even if it covers undeveloped territory, and I

submit this is not the law in this jurisdiction." R. 251.

The Court finally held that:

> "I think that the rule that should be applied here is the one that, since I think the Court can almost take judicial notice of the fact that this land is not in or anywhere near a commercially producing mineral area, gas and oil area, that allowing a jury to place a valuation on mineral rights or on the right to lease it for prospecting for gas and oil would be too speculative and remote to form the basis for compensation." R. 252-253.

Appellants respectfully submit that the above reasons expressed by the Trial Court as basis for the refusal to permit evidence to be given as to mineral values incorrectly state the law in this jurisdiction, as set forth in the Cal-Bay Corporation case, supra. The Appellate Court therein cited with approval the language of *Eagle Lake Improvement Co. v. United States*, supra, at p. 564, yet the Trial Court summarily states that "this is not the law in this jurisdiction." R. 251. The Trial Court has misapplied the rule of "reasonable probability" R. 89, and refused to recognize the law of this jurisdiction that "where there is a reasonable possibility of production in paying quantities, gas and oil leases are common subject of barter and sale and, therefore, have definite ascertainable market value." This rule would be equally applicable to mineral rights of the dominant owner, in this case, the appellants.

2. Appellants Were Denied a Fair Trial and Due Process of Law.

The error of the Trial Court in denying admission of the exhibits and testimony in question would be directly reflected only in the single cause of action, Civil Case No. 892. However, by reason of the Court's conduct of the case it is the further contention of appellants that their entire presentation as to all four consolidated cases was prejudiced. By the arbitrary actions of the Trial Judge, counsel for appellants was prevented from making an orderly and persuasive presentation of appellants' case.

CONCLUSION

As to Civil Case No. 892, the rejection of proffered evidence as to mineral values is clearly reversible error. All property rights that were capable of being translated into value should have been permitted to be introduced into evidence and considered by the jury, subject to proper instructions in accordance with the laws of this jurisdiction. The direct consequence of the Trial Court's error was that the verdict of the jury as to Civil Case No. 892 was inadequate as a matter of law.

As to the leasehold cases, Civil Cases Nos. 452, 488 and 762, the Trial Court, in arbitrarily excluding evidence and testimony, seriously prejudiced the presentation of appellants' entire case. Such reversible prejudice would necessarily be reflected in the verdicts of the jury as to said leasehold cases as well as the fee simple title case.

It is respectfully submitted that the appellants have

been thereby deprived of just compensation under due process of law and are entitled to a new trial.

Dated, Yakima, Washington,
October 11, 1956.

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